No. 12,056

IN THE

United States Court of Appeals

For the Ninth Circuit

GEORGE W. BOULTER and MARGRETTA L. BOULTER,

Appellants,

vs.

COMMERCIAL STANDARD INSURANCE COMPANY, a corporation,

Appellee.

Appeal from the United States District Court for the Northern District of California, Southern Division.

BRIEF FOR APPELLEE.

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FOREWORD.

Plaintiffs and appellants argue (i) that they establish a *prima facie* case (App. Op. Br. pp. 14-15), (ii) that defendant and appellee had the burden of proving the tractor *"was not being used"* for transportation of merchandise purposes (App. Op. Br. pp. 15-22), (iii) that their (claimed) *prima facie* case was not overcome by the testimony of defendant's witness as a matter of law (App. Op. Br. pp. 23-30), and (iv) that the jury had the right to conclude that the vehicle was being used for transportation of merchandise purposes (App. Op. Br. pp. 30-39). We

shall answer these arguments in the order indicated in the subject index, although we respectfully submit that the opinion* of Judge Yankwich (Tr. 53-74) very ably covers all the points raised by the appellants and demonstrates that they are without merit.

In this brief, italics are our own, except as to those appearing in passages taken from Judge Yankwich's opinion, in which instances they are used in lieu of the underlining which Judge Yankwich used.

ARGUMENT.

I.

THERE IS NO MERIT IN PLAINTIFFS' (APPELLANTS') CLAIM THAT DEFENDANT (APPELLEE) HAD THE BURDEN OF PROVING THAT THE TRACTOR WAS NOT BEING USED FOR TRANSPORTATION OF MERCHANDISE PURPOSES; ON THE CONTRARY, AS USE OF THE VEHICLE FOR TRANSPORTATION OF MERCHANDISE PURPOSES WAS THE ONLY USE COVERED BY THE POLICY IN QUESTION, PLAINTIFFS HAD THE BURDEN OF PROVING THAT, AT THE TIME AND PLACE OF THE ACCIDENT IN QUESTION, THE VEHICLE WAS BEING USED FOR SUCH PURPOSES.

Appellants have argued at length that "the defendant had the burden of proving that the tractor was not being used for transportation of merchandise purposes" (App. Op. Br. pp. 15-22).

Appellants assert that Appellee does not question "the sufficiency of the admissions and evidence to establish" the allegations of the complaint (App. Op. Br. p. 15), and then go on to affirm that "the only

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*The opinion is reported in 78 Fed. Supp. 895.

question remaining on this subject is whether it was incumbent upon plaintiffs to have gone further and negated the affirmative defenses pleaded in the answer," (App. Op. Br. p. 15).

It is clear, we submit, that Appellants have misconceived the entire nature of the cause of action which they are seeking to establish, and that their misconception is based upon a disregard of the nature and plain terms of the policy on which they seek to recover.

Appellants allege in paragraph IV of their complaint (Tr. p. 4) that the defendant (Appellee) issued a liability policy under which it undertook to pay any sums its assured was required to pay on any claims *"caused by accident and arising out of the ownership, maintenance, or use of a certain 1939 Dodge Tractor* * * *" (Tr. p. 4.)

This allegation is denied in paragraph III of defendant's answer (Tr. p. 10).

It is obvious that it was incumbent on plaintiffs to prove the existence of the insurance policy referred to in their complaint. Plaintiffs, as a part of their case in chief, introduced the policy in evidence (Plaintiffs' Exhibit No. 1, Tr. pp. 25-42; pp. 88-92).

The policy on which plaintiffs seek to recover is not a policy covering all uses of the vehicle therein described. It is a policy which covers the vehicles therein described while they are "used only for transportation of merchandise purposes" (Tr. p. 25).

The distinction is well stated in Judge Yankwich's opinion (Tr. 61):

> "The defendant did not insure against all the risks of the plaintiffs while engaged in the business of trucking, but only against a specific risk. Otherwise put, it insured the automobiles when *'used only for transportation of merchandise purposes.'*"

That it is incumbent upon *plaintiffs* to prove, when seeking to recover on a policy of this type, that the vehicle in question was, at the time of the accident, being used for *the only purposes covered by the policy*, and that the burden of such proof is on the plaintiffs, is established beyond controversy (we submit) by the numerous authorities which have dealt with the subject.

The general rule is stated as follows in 21 "Insurance Law and Practice", by Appleman, Section 12272, page 126, where the commentator makes the following observation:

> "The plaintiff must prove that an automobile causing the injury was one of the automobiles operated in the insured's business, insured under a blanket liability policy. The plaintiff may also be required to prove that the vehicle was operated in the business or service authorized by a certificate or permit. It is also necessary to prove that the truck was operated for commercial purposes, where that is the sole coverage of the policy."

The leading case upon the subject appears to be *Habedank, et al. v. Atlantic etc. Insurance Co.* (1942), 128 N.J.L. 338, 25 Atl. (2d) 889. In that case the Appellate Court sustained a judgment of nonsuit in an action by which the plaintiff sought to compel an insurance carrier to pay a judgment against its assured. The Court stated:

> "One of the warranties contained in the policy provided that the automobile would be used only for 'commercial' use and the policy further specifically provided that it was not to cover any liability of the assured arising out of the use of the automobile for any purpose other than that just specified. The learned trial judge ruled that appellants failed to prove that the automobile was used for a commercial use and * * * granted a non-suit. Judgment was entered accordingly. The propriety of that judgment is challenged. * * * Under the particular policy of insurance before us * * * we think that as a condition precedent to recovery, it was incumbent upon appellants to prove not only permission, but also that the automobile, at the time of the accident was operated for a 'commercial use' as specified in the policy. * * * It was not a condition subsequent * * * Here the condition in the policy was that the car be used for 'commercial use' is in the nature of a 'promissory warranty', a 'condition precedent' to the right of recovery * * * It is a condition which has been likened to an 'exception' or 'proviso' in the enacting clause of a statute. Under such circumstances, the pleadings and proof must show the facts to be outside the 'exception' or 'proviso' and within the general

clause, but if the 'exception' or 'proviso' be elsewhere than in the enacting clause that is something to be set up in an answer or plea."

Numerous authorities are in accord.

In *Jones v. Manufacturers Cas. Ins. Co.* (1942), 313 Ill. App. 386, 40 N. E. (2d) 545, the Court said:

"The burden of proof rests upon the plaintiffs to establish that the use made by the assured of the truck at the time of the collision came within the coverage of the policy." (40 N. E. (2d) 547.)

In *Lavine v. Ind. Ins. Co. of N. A.* (1933), 260 N. Y. 399, 183 N. E. 897, the liability policy upon which the plaintiff sought recovery provided coverage for use of a vehicle in connection with the assured's place of business in Albany, New York. The Court stated:

"As a conclusion of law, the trial court found that the insurance company, having pleaded that the Studebaker automobile was not being used when the accident occurred in connection with assured's Albany place of business, and that the loss was not within the coverage of the policy, the burden of proof thereof was upon the defendant, and further that the defendant failed in its burden of proving said defense. In those conclusions we think the trial court was in error." (183 N. E. 899.)

* * * * * * *

"The burden of proof rested upon the plaintiff to establish that the policy covered. That burden was not shifted to the defendant, because of an affirmative allegation in the answer to the effect that the policy did not insure against the accident

in question. The denials in the answer raised an issue as to whether the accident came within the indemnity coverage provided in the policy. That was the issue, and not whether liability did not exist under the policy because the accident fell under some provisions of the policy relieving the defendant from liability." (183 N. E. 900.)

Attention is directed to the portion of the opinion last quoted in which the Court points out that the *"burden was not shifted to the defendant, because of an affirmative allegation in the answer to the effect that the policy did not insure against the accident in question"*.

Defendant in the instant case, in addition to denying the general allegation of coverage (Tr. p. 10), pleaded that the vehicle at the time of the accident was not being used for transportation of merchandise purposes (Tr. pp. 11-13). That this matter was so pleaded does not shift the burden of proof. The law on this point is clear and is well stated in the opinion just referred to, as well as in numerous other cases. See, for example, *Kellner v. Travelers Insurance Co.* (1919), 180 Cal. 326 at 330, 181 Pac. 61.

See, also:

Manthey v. Am. Auto Ins. Co. (1941), 127 Conn. 516, 18 Atl. (2d) 397:

"Where * * * the defendant raises the issue of violation of some particular condition of the policy by a special defense, the burden of proving this issue is on the plaintiff." (18 Atl. (2d) 399.)

* * * * * * *

"The quotations from the policy show coverage as to commercial use * * * The plaintiff had the burden of proving that the coverage existed, and having failed to do so the judgment of the trial court was correct." (18 Atl. (2d) 399.)

Liberty Mutual Ins. Co. v. Martel (1937), 88 N. H. 479, 192 Atl. 152:

Syll. para. 1:

"In suit by insurer to determine question of coverage under automobile liability policy, insurer did not have burden of proof on issue of non-coverage."

Whitlock v. Individuals etc. Assn. (1932), 138 Ore. 383, 6 Pac. (2d) 1088:

Syll. para. 4:

"In action against insurer on blanket liability policy, it was necessary to prove that automobile causing injury was one of autos operated in insured's business (Laws 1925, p. 756)."

Smith v. Rep. Underwriters (1940), 152 Kan. 305, 103 Pac. (2d) 858:

"Having given consideration to the commercial operations provided for in the certificate or permit—and therein specifically set out—the company issues a policy covering vehicles engaged in such operations. It does not insure vehicles otherwise engaged—that is, which are being used for commercial, personal or social purposes outside the operations covered by the permit * * * It was clearly part of the plaintiff's case to show insurance coverage * * * If a private car covered by

> the usual policy is involved in an accident, the plaintiff in an action against the insurance carrier must show that the policy covers the car therein described. A plaintiff has the same burden to show coverage when the issue of coverage turns, not upon description of the vehicle, but upon whether it was being used in operations authorized by the permit" (103 Pac. (2d) 860).

Numerous California cases dealing with insurance litigation are in line with the rule above referred to.

Thus in *Allen v. Home Insurance Co.* (1901), 133 Cal. 29, 65 Pac. 138, a fire policy covered a building *"while occupied as a dwelling house";* the Court held that, as insurance extended *only for such use of the insured premises,* it was an essential part of the plaintiff's case that she plead and prove such use. The Court stated, in this respect:

> "The allegation was not merely a condition precedent, as referred to in section 457 of the Code of Civil Procedure. It went to the very essence of plaintiff's right to recover. Certain conditions subsequent to the right of recovery, matters of defense, the non-performance of conditions subsequent, and certain negative prohibited acts need not be pleaded by plaintiff; but the rule does not extend to the essence of the cause of action" (133 Cal. 30).

A similar holding appears in *Arnold v. American Insurance Co.* (1906), 148 Cal. 660, 84 Pac. 182, where fire coverage was provided on a building *"while occupied as a dwelling house".* In an action on the policy,

the Court held that the failure of the plaintiff to allege such use rendered his complaint defective, and approved the holding of *Allen v. Home Insurance Co.*, supra.

In *Agalianos v. American Central Insurance Co.* (1923), 62 Cal. App. 349, 217 P. 107, a fire policy provided coverage on a building *"only while occupied for mercantile and restaurant purposes"*. The Court stated:

> "It has been held that where, as here, the action is to recover on an insurance policy, a cause of action is not stated unless it be shown by the complaint that the loss alleged was within the terms of the policy. In this case, therefore, under the construction placed by the defendant upon the above provision of the contract between the insurer and the insured, it was, to state a cause of action against the defendant, indispensably necessary to allege that the building destroyed was, at the time of the fire, used by the insured for mercantile and restaurant purposes" (62 Cal. App. 353).

See also:

Balan v. National Union Fire Ins. Co. (1912), 19 Cal. App. 778, 127 P. 829,

where the Court held that the complaint did not state a cause of action where it "contained no statement showing that the buildings were being put to the particular uses limited by the insurance contract at the time they were destroyed" (19 Cal. App. 779).

The general rule is also stated in *Ells v. Order of United etc. Travelers* (1942), 20 Cal. (2d) 290, 125

Pac. (2d) 457, where a plaintiff was seeking to recover on a contract of insurance which insured against accidental death. The Court stated:

> "The burden was on the respondents [plaintiffs] to establish as a part of their case that death resulted from an accident, as defined by the terms of the contract of insurance, and it was not incumbent on the appellant to prove that death was not caused by accident" (20 Cal. (2d) 304).

We are not unmindful of cases (such as those cited by Appellants in their opening brief, pages 15-22) in which courts have held that the burden is on an insurance company to prove facts which bring into operation *an exception to general coverage* or a condition subsequent. Those cases, however, are not pertinent in this case, because here the *only coverage* provided is coverage on a vehicle while "used only for transportation of merchandise purposes * * * and * * * for no other use or operation" (paragraph 5 of "Declarations", Tr. p. 25).

Akin to the rule above referred to is the rule long adhered to that a plaintiff seeking to recover on a liability policy which extends coverage to cars used only with the permission of the assured must sustain the burden of proving permissive use.

Thus, in *Denny v. Royal Indemnity Company* (1927), 26 Ohio App. 566, 159 N. E. 107, the court on appeal affirmed a directed verdict in favor of defendant insurance carrier where it appeared that the record was "absolutely silent on the question of permission to use the car" (157 N. E. 109).

See also

Bowen v. Cote (C. C. A. 1, 1934) 69 Fed. (2d) 136.

It is respectfully submitted that the above authorities establish beyond controversy that in this case plaintiffs (appellants) had the burden of proving that the vehicle was engaged in an operation covered by the policy (i.e. that it was being used for "transportation of merchandise purposes") at the time of the accident and that defendant (appellee) was required to assume no burden of proof on this issue.

II.

THERE IS NO MERIT IN PLAINTIFFS' (APPELLANTS') CLAIM THAT THEY "ESTABLISHED A PRIMA FACIE CASE"; ON THE CONTRARY, IN VIEW OF PLAINTIFFS' FAILURE TO SHOW AFFIRMATIVELY AS PART OF THEIR CASE IN CHIEF THAT THE VEHICLE WAS ENGAGED IN ANY USE COVERED BY THE POLICY, THE PLAINTIFFS WHOLLY FAILED TO ESTABLISH A PRIMA FACIE CASE.

Appellants argue (App. Op. Br. pp. 14-15) that they established a *prima facie* case.

It is hardly necessary to point out that in order for plaintiffs to establish a *prima facie* case, it was incumbent upon them to show facts which would entitle them to recover on the policy which is the subject matter of this action. Their failure, after placing the policy in evidence, to show that at the time of the accident the vehicle described in the policy was being used for any use covered by the policy rendered their case in chief fatally defective.

The authorities cited under point I (supra) establish this proposition. See, particularly, *Habedank, et al v. Atlantic etc. Insurance Company* (supra), p. 5, in which the Appellate Court sustained a judgment of non-suit granted when plaintiff failed to show an insured use. And see *Mawhinney v. Southern Insurance Company* (1893), 98 Cal. 184, 32 Pac. 945.

III.

THE USE TO WHICH THE TRACTOR WAS BEING PUT AT THE TIME AND PLACE OF THE ACCIDENT HERE INVOLVED WAS NOT A USE "FOR TRANSPORTATION OF MERCHANDISE PURPOSES" WITHIN THE MEANING OF THE POLICY, AND, ACCORDINGLY, LIABILITY COVERAGE DID NOT EXTEND TO THE TRACTOR AT THAT TIME AND PLACE.

Irrespective of who had the burden of proof or whether plaintiffs (appellants) made out a *prima facie* case, we submit that the evidence affirmatively shows that the vehicle was not covered at the time and place of the accident.

It is, of course, conceded that at the time of the accident in question the assured "physically * * * wasn't carrying merchandise" (concession by plaintiffs' counsel, Tr. 119).

It is the contention of the Appellants (quite apart from the question of the burden of proof) that the use to which the vehicle in this instance was being put constituted "transportation of merchandise" within the meaning of the policy and counsel cites (App. Op. Br. pp. 33-39) cases in which it is held that liability

coverage will extend if the use to which the vehicle was being put is an immediate incident of the purpose or use described in the policy.

The trial Court in its opinion (Tr. 59) refers to this class of cases, and approves them, as do we.

However, where as here, the use is *"totally unrelated to the use or the physical incident which resulted in the accident * * * liability does not exist"*, as pointed out in the opinion of the learned trial judge (Tr. 59).

As stated in Judge Yankwich's opinion (Tr. 61):

> "the use of a portion of the insured equipment, the truck part, to return to the place of origin, San Francisco, 250 miles away, *not* for the purpose of picking up a new load, or beginning a new haul, or storing or repairing the truck, *but for the purpose of paying a premium on an insurance policy on the truck, is not an act incidental to the transportation of goods on the truck or trailer.* Nor, for that matter, is the soliciting of business an incidence of such transportation. To be accessory to the business in which the truck was used, it would have to be covered by a policy which, either did not include any limitation, or insured generally against *any act or acts of the defendant while engaged in trucking for hire.* But the policy here under consideration *was not so comprehensive.* The defendant did not insure against all the risks of the plaintiffs while engaged in the business of trucking, but only against a specific risk. Otherwise put, it insured the automobiles when *'used only for transportation of merchandise purposes.'*"

We have searched in vain (understandably) for any case which has held, or even in which the claim has been made, that "transportation of merchandise" includes the use of a vehicle for driving 250 miles to pay a premium on an insurance policy, even though (assuming it to be the fact) the assured had, as an added purpose, an un-consummated and wholly unresolved "secret intent" to communicate with a prospective customer about future hauling operations, but intended all the while to return to his point of origin (the Eureka area) before embarking on such subsequent hauling operations.*

However, we submit that, by analogy, the following cases establish that the use to which the vehicle in this instance was being put was not a use for transportation of merchandise within the meaning of the policy.

In *State Compensation Insurance Fund v. Bankers Indemnity Insurance Company* (C. C. A. 9, 1939), 106 Fed. (2d) 368, this Court was confronted with a somewhat similar claim. The defendant insurance company in that case had issued a liability policy which provided that "the Company shall not be liable * * * for * * * claims arising from the use of any automobile for purposes other than those specified in the Declaration", which, in turn, provided that "the business of the Assured is hauling dirt for the City of Oakland" and that "the purposes for which the de-

*We discuss in the appendix to this brief the evidence and what it shows with respect to the use of the vehicle at the time of the accident.

scribed automobiles are and will be used are: commercial use * * *"

The term "commercial use" was defined as "usual to the business of the named assured as described above, including loading and unloading of goods."

The assured was under a contract to furnish a truck and driver to, and to haul dirt and men for, Alameda County.

One of the men being carried by the assured on the job was injured, and his compensation carrier sought to compel the assured's liability carrier to indemnify the compensation carrier for funds laid out by it in respect of the injuries.

Judgment went for the defendant liability insurance carrier and, as one of its specifications of error, the compensation carrier urged that the vehicle "was being used by the assured in a commercial use, usual to the business of assured of hauling dirt including the loading and unloading thereof."

In affirming judgment for the defendant insurance carrier, this Court stated: "Appellants argue that the transportation of the workers was *incidental* to the business at hand and was permissible under the policy * * * The Policy states that the business of the insured is that of hauling dirt. At the time the policy was issued Dalton [the assured] was employed for that purpose by the City of Oakland. At that time it was not part of his employment to transport men to or from work. In fact, as he testified, it never had been part of his duties to carry workmen in con-

nection with his employment except on this road work where the accident occurred. So far as the transportation of workmen in his truck having been usual or incidental to Dalton's business at, or prior to, the time of the issuance of the policy, the evidence is to the contrary and the finding of the trial Court in this regard must be sustained."

In *Commercial Standard Insurance Company v. Bacon* (C. C. A. 10, 1946), 154 Fed. (2d) 360, coverage was provided "on any motor vehicle operated or used for the transportation of freight or express, or both." An injury occurred while the vehicle was in a shop undergoing repairs, and the Court held that coverage did not extend. The case is of particular interest because in its opinion the Court refers with approval to *Mawhinney v. Southern Insurance Company* (1893), 98 Cal. 184, 32 Pac. 945. In that case recovery was sought on a fire policy which extended coverage to a harvester while "operating in the grain fields and in transit from place to place in connection with harvesting." The Supreme Court of California held that destruction by fire while the harvester was undergoing repairs in a blacksmith shop was not included in the coverage provided, and that the defendant insurance company should have been granted a non-suit at the close of plaintiff's case.

In *Farm Bureau etc. Insurance Company v. Daniel* (C. C. A. 4, 1939), 104 Fed. (2d) 477, liability coverage was provided, subject to the clause that the purposes for which the automobile was to be used were "hauling auto parts, building material and farm produce." The occupation of the assured was given as

"auto dealer and farmer." It appeared that in connection with his automobile business the assured conducted a garage, and that at the time of the accident in question the vehicle described in the policy was being used for the purpose of carrying wrecked auto parts from the scene of an accident back to the garage operated by the assured. The Court held that liability arising out of an accident on such a trip was not covered.

In *C. E. Carnes & Co. v. Employers etc. Corporation,* (C. C. A. 5, 1939), 101 Fed. (2d) 739, liability coverage was provided the assured in the business of "Handling Farm Machinery, Crain Fixtures, and Paints." The Court held that this policy did not provide coverage where the accident occurred while the vehicle was hauling Butane gas.

In *General Tire Co. v. Standard Accident Insurance Co.* (C. C. A. 8, 1933), 65 Fed. (2d) 237, the policy in question provided liability coverage for certain vehicles to be used "only for commercial purposes, excluding car use and towing". The principal use described in the policy was for "checking air and inflating tires on various fleet accounts". The Court held that no coverage was provided for an accident which occurred while the vehicle was being used to carry a tire and tube mounted on a spare wheel, even though the same was being delivered to one of the assured's regular customers.

In *Duke Anderson Drilling Co. v. Smith* (1943), 193 Okla. 107, 141 Pac. (2d) 565, judgment notwithstanding the verdict was affirmed in favor of the

defendant insurer. The policy there in question provided "the automobile will be principally * * * used * * * for transportation and delivery of merchandise for compensation." At the time of the accident the vehicle was being used to pull another truck onto the highway after it had run into a ditch. The Court held that this was not a use covered by the policy.

See also the authorities cited in footnote 24 of Judge Yankwich's opinion (Tr. 73).

Numerous additional authorities can be cited to the same effect. See the following:

Williams v. American Automobile Insurance Co. (C. C. A. 5, 1930), 44 Fed. (2d) 704: hauling Boy Scouts was held to be not a "commercial purpose"; the Court stated: "Any incidental benefit or good will that might result from its use in an attempt to curry favor with an employee of the city water works is too remote to support the inference that such use was for commercial use."

Manthey v. American Automobile Insurance Company (1941), 127 Conn. 516, 18 Atl. (2d) 397: an insuring clause providing for coverage for "transportation or delivery of goods, merchandise or other materials and uses incidental thereto in direct connection with the insured's business", which was stated to be that of a dairy farmer, was held not to cover an accident which occurred while the assured's nephew was returning from having delivered a chicken to a customer.

Euto v. American etc. Casualty Co. (1936), 247 App. Div. 613, 288 N. Y. S. 232: a clause providing

coverage for any "commercial use * * * usual to the business of the named insured", which was that of a sand and gravel dealer, was held not to include an accident which occurred while the insured truck was being used in highway snow removal operations.

See also the following cases:

Hoar v. Gray (1945), 352 Pa. 373, 42 Atl. (2d) 822;

Bohnsack v. Huson-Ziegler Co. (1933), 212 Wisc. 65, 248 N. W. 764;

Snyder v. Natl. Union Ind. Co. (C. C. A. 10, 1933), 65 Fed. (2d) 844.

The analogies afforded by the above cases, we submit, demonstrate that the use of the vehicle in the instant case was not covered by the policy here involved.

IV.

THE STATUTORY ENDORSEMENT AFFIXED TO THE POLICY UNDER THE HIGHWAY CARRIERS' ACT AND THE RULES AND REGULATIONS OF THE PUBLIC UTILITIES COMMISSION (FORMERLY THE RAILROAD COMMISSION) CANNOT SERVE AS THE PREDICATE FOR ANY CLAIM OF COVERAGE, IN VIEW OF THE FACT THAT AT THE TIME AND PLACE OF THE ACCIDENT IN QUESTION THE VEHICLE WAS NOT BEING USED AS A COMMON CARRIER, OR FOR ANY PURPOSE DESCRIBED IN THE POLICY, OR FOR WHICH ANY PERMIT OF THE RAILROAD COMMISSION WAS REQUIRED, OR IN RESPECT OF WHICH SUCH ENDORSEMENT HAD ANY APPLICATION.

It would unduly prolong this brief to develop at length the proposition stated in the heading.

Judge Yankwich's opinion (Tr. 61-65) covers the point with clarity. See particularly the following portion (Tr. 61-62):

> "The Railroad Commission rider attached to the policy, which is reproduced in the margin, did not enlarge on the coverage. Its aim, as I stated at the argument, was to protect the public against certain defenses arising from violations of the law by employees, lack of authorized use and the like, which might defeat liability. It did not, and could not, change a coverage limited to *a specific use* to a general coverage of the truck, *regardless of the use.*"

The opinion discusses and quotes *Foster v. Commercial Standard Ins. Co.,* 121 Fed. (2d) 117 (C.C.A. 10, 1941), which this Court approved in *Associated Indemnity Co. v. Bunney,* 137 Fed. (2d) 1 (C.C.A. 9, 1942).

See also: *Hawkeye Casualty Co. v. Halferty,* 131 Fed. (2d) 294 (C.C.A. 8, 1942), and *Simon v. American Casualty Co.,* 146 Fed. (2d) 208 (C.C.A. 4, 1944), which are cited in Footnote 24 of the Opinion (Tr. 73), and see the additional cases cited in that Footnote.

V.

AS THERE WAS NO SUBSTANTIAL CONFLICT IN THE EVIDENCE, AND NO SUBSTANTIAL EVIDENCE ON WHICH JUDGMENT IN FAVOR OF PLAINTIFFS (APPELLANTS) COULD BE SUSTAINED, THE TRIAL COURT WAS CORRECT IN GRANTING JUDGMENT FOR DEFENDANT (APPELLEE) NOTWITHSTANDING THE VERDICT.

In their account of the facts developed at the trial (App. Op. Br. pp. 6-9) appellants have set forth (presumably) their most favorable view of the evidence developed at the trial.

We submit that a reading of appellants' statement demonstrates that the evidence is without substantial conflict and shows affirmatively (irrespective of who had the burden of proof or whether a *prima facie* case had been established) that at the time of the accident the vehicle described in the policy was not being put to any use for which liability coverage was provided in the policy. See also the appendix to their brief.

Appellants, at one point in their brief (App. Op. Br. p. 32) have even sought to make it appear that at the time of the accident Warner was on a normal return trip after having delivered cargo for compensation. This statement overlooks the undisputed testimony of the assured as to the use being made of the vehicle at the time of the accident. There is no evidence whatsoever that the assured was merely on a normal return journey from a carrier run. The evidence, as set out in appellants' opening brief (pages 6-9) and in the appendix to this brief, precludes any such claim.

Appellants (App. Op. Br. p. 34) pose the rhetorical question "Does the liability of the defendant turn on his [the assured's] secret intent or on his overt acts as found by the jury?". At the same time that appellants object to any inquiry as to the "secret intent" of the assured, they place great weight on the assured's (claimed) secret intent to communicate with Dowdell with regard to subsequent carrier operations. Thus, appellants' objection to any inquiry as to the assured's intentions on the trip when the accident occurred is inconsistent and merely serves to demonstrate that appellants' objection to any inquiry as to the intent of the assured is without merit.

Finally, although a normal return journey from a carrier run might well have brought the accident here in question within the ambit of the coverage clause, the evidence shows without substantial conflict that at the time when the accident occurred the assured was not engaged on a return journey from a carrier run.

Under these circumstances we submit that it was not only proper but requisite that the trial Court direct a verdict in favor of the appellee.

The general rules covering directed verdicts are well known to this Court.

As stated in *Perumean v. Wills* (1937), 8 Cal. (2d) 578, 67 Pac. (2d) 96, in which the Court quoted from *Estate of Baldwin* (1912) 162 Cal. 471; 123 Pac. 267:

> " 'A directed verdict is proper, unless there be substantial evidence tending to prove in favor of plaintiff all the controverted facts necessary to

> establish his case. In other words, a directed verdict is proper whenever, upon the whole evidence, the judge would be compelled to set a contrary verdict aside, as unsupported by the evidence. To warrant a court in directing a verdict, it is not necessary that there should be an absence of conflict in the evidence, but, to deprive the court of the right to exercise this power, if there be a conflict, it must be a substantial one.' " (8 Cal. (2d) 581.)

In this connection we point out that the "scintilla of evidence rule" has been rejected in this jurisdiction. See *Walters v. Bank of America* (1937) 9 Cal. (2d) 46, 69 Pac. (2d) 839, and *DeZon v. Amer. Pres. Lines* (C.C.A. 9, 1942) 129 Fed. (2d) 404; affirmed, 318 U.S. 660 (1943).

And see: *Galloway v. U. S.* (1943) 319 U.S. 372, where the Supreme Court, in affirming judgment on a directed verdict for the defendant, stated:

> "the essential requirement is that mere speculation be not allowed to do for probative facts, after making due allowance for all reasonably possible inferences favoring the party whose case is attacked." (319 U.S. 395.)

Connelly v. U. S. (C.C.A. 5, 1941), 123 Fed. (2d) 1:

> "Evidence which does no more than open the door to speculation is not sufficient to support a verdict * * * The trial court properly directed a verdict for the defendant."

Alexander v. Standard Accident Ins. Co. (C.C.A. 10, 1941) 122 Fed. (2d) 995:

> * * * "The mere choice of probabilities does not constitute evidence and will not be submitted to the jury. Nor does the placing of inference on inference or presumption on presumption constitute a sufficient basis for the determination of facts."

We submit that under the rule of the above cases the action of the trial Court was proper.

VI.

THERE IS NO MERIT IN THE SUGGESTION MADE BY THE PLAINTIFFS (APPELLANTS) THAT THE ORDER OF THE TRIAL COURT DENYING DEFENDANT'S (APPELLEE'S) MOTION TO DISMISS PRECLUDED THE COURT FROM THEREAFTER GRANTING A JUDGMENT FOR DEFENDANT NOTWITHSTANDING THE VERDICT.

Appellants argue in their brief that a directed verdict cannot be granted "upon evidence offered by a defendant after a plaintiff has first established a *prima facie* case" (App. Op. Br. p. 25, et seq.).

This statement is not in accord with the law controlling in this case (quite apart from the fact, as we have shown, that appellant failed to make out a *prima facie* case).

As stated in 24 *Cal. Jur.* 916, "Trial", sec. 163:

> "And the fact that the court has denied a motion for a nonsuit will not prevent it from subsequently directing a verdict for the defendant when the condition of the evidence so warrants. An order directing a verdict will not be reversed on appeal unless the trial court has abused its discretion."

In *Arthur v. London Guarantee and Accident Co.* (1947), 78 Cal. App. (2d) 198, 177 Pac. (2d) 625, a liability insurance carrier defended an action in which its assured sought to compel it to pay a judgment against the assured. The insurance carrier defended on the grounds that the plaintiff had failed to give notice as required by the policy. There was evidence that the assured had sent photographs of the accident to its broker. The Court held that it could not be presumed "from this set of facts that the insurance company had received notice of the accident." At the conclusion of the plaintiff's case a *motion for nonsuit was denied.* At the conclusion of defendant's case a *motion for directed verdict was denied.* The jury returned a verdict for plaintiff. Thereafter the trial Court *granted the defendant's motion for judgment notwithstanding the verdict,* and that order and judgment were affirmed on appeal.

See also *Sellers v. Solway Land Co.* (1916), 31 Cal. App. 259 at 269, 160 Pac. 175, and *Fuchs v. Southern Pacific Co.* (1935), 5 Cal. App. (2d) 409 at 412, 42 Pac. (2d) 704, where the Court stated:

> "the settled rule is that the fact that a motion for a nonsuit has been denied does not prevent the court from subsequently directing a verdict for the defendants. (24 Cal. Jur. 916.)"

VII.

THE TRIAL COURT COMMITTED ERROR PREJUDICIAL TO APPELLEE WHEN IT (a) DENIED APPELLEE'S MOTION FOR DISMISSAL UNDER RULE 41-b AT THE CONCLUSION OF APPELLANTS' CASE, (b) DENIED APPELLEE'S MOTION TO SET ASIDE THE ORDER STRIKING THE PLEA OF RES JUDICATA, AND (c) DENIED APPELLEE'S MOTION FOR A NEW TRIAL, IN THE ALTERNATIVE, SO CONDITIONED THAT THE ORDER GRANTING SUCH NEW TRIAL WOULD BECOME EFFECTIVE ONLY IN THE EVENT THAT THE JUDGMENT NOTWITHSTANDING THE VERDICT SHOULD BE REVERSED ON APPEAL.

After the verdict, defendant renewed its motion for a directed verdict and moved the Court for judgment notwithstanding the verdict and, in the alternative, for an order granting a new trial, so conditioned that such order should become effective only in the event that the judgment notwithstanding the verdict should be reversed on appeal (Tr. 48-51). The motion for judgment notwithstanding the verdict was granted but the alternative motion for new trial was denied (Tr. 51).

We do not anticipate that the Court will reverse the judgment in this case.

However, in order to forestall any claim that we have abandoned our position, we hereby assign as error the three rulings referred to in the heading.*

Our authority for seeking here a review of these rulings is *Montgomery-Ward Co. v. Duncan* (1940), 311 U.S. 243, 85 L.Ed. 547, where the Court stated:

---

*If the judgment is affirmed, it is obvious that the points here referred to will become moot.

> "If the trial judge, as he did here, grants judgment n. o. v. and denies the motion for a new trial, the party who obtained the verdict may, as he did here, appeal from that judgment. Essentially, since his action is subject to review, the trial judge's order is an order nisi. The judgment on the verdict may still stand, because the appellate court may reverse the trial judge's action. This being so, we see no reason why the appellee may not, and should not, cross-assign error, in the appellant's appeal, to rulings of law at the trial, so that if the appellate court reverses the order for judgment n. o. v. it may pass on the errors of law which the appellee asserts nullify the judgment on the verdict".

In reference to the opinion just quoted it is suggested in "Federal Rules of Civil Procedure with Approved Amendments", 1947 Revised Edition, published by West Publishing Co. (p. 395):

> "When the Supreme Court uses the words 'cross-assign error', it is to be assumed that the old form of assignments of errors is not contemplated since that was abolished by Rule 75, except in the case where the appellant does not designate the complete record for review in which event a statement of the points to be relied upon must also be filed. Probably all that should be required of the appellee is a statement in his brief that on the appellant's appeal he will also raise the counter-points set forth in his appellee-brief."

(a) The trial Court committed error prejudicial to appellee when it denied appellee's motion for dismissal under Rule 41-b (F. R. C. P.) at the conclusion of appellee's case.

After introducing in evidence, as part of their case in chief, the insurance policy upon which they are here seeking to recover (Ptf's Exhib. #1, Tr. 88 et seq.), plaintiffs wholly failed to introduce any evidence whatsoever respecting the use to which the vehicle was being put at the time and place of the accident in question.

At the conclusion of plaintiffs' case defendant (appellee) moved for a dismissal under the provisions of Rule 41-b (F. R. C. P.) on the ground that plaintiffs, after completing the presentation of their evidence, had not shown any right to relief (Tr. 95). This motion was denied (Tr. 97).

For the reasons set out under points I and II (supra), the ruling by which the trial Court denied the motion to dismiss was erroneous.

That the error was prejudicial to appellee was, we submit, clear: appellee was required to proceed, after plaintiffs rested, with proof of matters which were part of plaintiffs' case; the tactical disadvantage to which appellee was put is, we submit, obvious; plaintiffs should have been required to prove all of the elements of their cause of action, and as they had failed to do so when they rested, their action should have been dismissed.

(b) The trial Court committed error prejudicial to appellee when it denied appellee's motion to set aside the order striking the plea of res judicata.

In paragraph VII of its answer (Tr. 13-21), defendant (appellee) pleaded the defense of *res judicata,* based upon judgments in the declaratory relief action by which Judge Goodman had declared (after listening to Warner testify) that the accident here involved was not covered by the policy here in question. The assureds, Warner and Woodrow, were served with process in the declaratory relief action and defaulted. The plaintiffs in the personal injury action (plaintiffs and appellants here) were not served with such process (Tr. 67).*

Nevertheless, it was and is the contention of appellee that the adjudication of non-coverage was binding upon appellants and that the order striking the defense of *res judicata* and the order of the trial Court in refusing to permit such defense to be reinstated (Tr. 98-99) were erroneous.

It is hardly necessary to point out that in an action of this type "the injured person has the same right against the insurance carrier as the insured would have, and that a defense good against the insured is good against the injured claimant," (*Sears v. Illinois Indemnity Company* [1932], 121 Cal. App. 211 at 224, 9 Pac. [2d] 245), and that "the injured person stands in no better position than the assured" (*Valladao v. Firemen's Fund Indemnity Co.* [1939], 13 Cal. [2d]

*Plaintiffs were well aware of the pendency of the declaratory relief action and had adequate opportunity to protect their interests in that litigation (see Defendant's Exhibit C, Tr. 183-184).

322, 89 Pac. [2d] 643. See also *Royal Ind. Co. v. Morris* [C.C.A. 9, 1929] 37 Fed. [2d] 90).

It is clear (we submit) that if the assureds had attempted, after the declaratory relief action, to sue the insurance company on the policy, the plea of *res judicata* based on the judgment in the declaratory relief action would have constituted a valid defense against the assureds. We submit that it is equally a valid defense against the plaintiffs and appellants here, since they stand in the shoes of the assureds.

The rules for determining the validity of a plea of *res judicata* were stated as follows in *Bernhard v. Bank of America* (1942) 19 Cal. (2d) 807 at 813; 122 Pac. (2d) 892: "In determining the validity of a plea of *res judicata* three questions are pertinent: Was the issue decided in the prior adjudication identical with the one presented in the action in question? Was there a final judgment on the merits? Was the party against whom the plea is asserted a party or in privity with a party to the prior adjudication?" (19 Cal. [2d] 813).

That the plea of *res judicata* made by the defendants in the instant action falls squarely within the requirements laid down in the *Bernhard* case is, we submit, manifest: (i) the issue of coverage was squarely determined in the action for declaratory relief; (ii) the judgment in the declaratory relief action was a final judgment on the merits on the question of coverage, and (iii) the party against whom the defendant in this case asserted the plea of *res judicata* is "in privity with a party to the prior adjudication".

That the assured in a liability policy and a person injured by his negligence are in privity within the meaning of the rule above referred to is held in *Connold v. Stern,* 138 Oh. St. 352; 35 N.E. (2d) 133; affirmed in 67 Oh. App. 134; 36 N.E. (2d) 38 (1940).

In that case, it appeared that *Luntz* and *Connold* had been injured by the negligence of *Stern,* the assured. They recovered judgment against *Stern,* and thereafter *Luntz* brought an action against *Stern* (the assured) *and* his *liability insurance carrier,* which resulted in an adjudication of non-coverage. *Connold, who was not a party to that proceeding,* thereafter brought an action against the liability insurance carrier, and it was held that the adjudication of non-coverage was binding on *Connold,* even though he was not a party to the proceeding in which the adjudication was made. The Court noted that *Connold's* action was derivative, and stated:

> "* * * the right of Stern [the insured] against the insurer cannot be relitigated. His right against the insurance company was fully litigated in the former supplemental action and the judgment against him in that case stands as a bar for all time. Restatement of Judgments (tentative Draft No. 1), 130, Section 330. Must it not be a bar against any third party whose right, if any, against the insurance company is derived from and dependent upon a valid right of Stern [the insured] against the insurance company. * * * *Res judicata* or estoppel operates not only between parties to an action but between parties, and others not parties, as to the derivative rights of the latter which flow from those who were adversary parties in the action."

The relationship between the assureds (Warner and Woodrow) and the plaintiffs in this action was clearly stated by plaintiffs' counsel when he wrote to the assureds, Warner and Woodrow, on December 4, 1946 (Def.'s Ex. C, Tr. 183-184) and called their attention to the pendency of the declaratory relief action and pointed out that his clients (plaintiffs in the instant action) as well as Warner and Woodrow, were named defendants in the declaratory relief action, and stated *"there is a unity of interest between us"* (Tr. 184).

In view of the rules above set out, we submit that the plea of *res judicata* should have been allowed to stand.

(c) The trial Court committed error prejudicial to appellee when it denied appellee's motion for a new trial, in the alternative, so conditioned that the order granting such new trial would become effective only in the event that judgment notwithstanding the verdict should be reversed on appeal.

We have pointed out under sub-headings (a) and (b) errors of law committed on the trial of the action.

In the remote contingency that this Court should hold that Judge Yankwich erred in granting judgment notwithstanding the verdict, we respectfully submit that, in view of the errors of law above referred to, appellant would be entitled, in such alternative, to a new trial. See *Montgomery-Ward & Co. v. Duncan,* pp. 27-28, supra.

VIII.

CONCLUSION.

In conclusion, it is respectfully submitted that the judgment notwithstanding the verdict should be affirmed, and that if this Court should hold otherwise, a new trial should be allowed.

Dated, San Francisco, California,
February 16, 1949.

Respectfully submitted,
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(Appendix Follows.)

Appendix.

Appendix

REFERENCES TO RECORD WHICH SHOW PURPOSE OF WARNER IN MAKING TRIP ON WHICH ACCIDENT OCCURRED.

Two days after the accident, in his report to the insurance company (Def's. Ex. B, Tr. 175-178), dated *June 24, 1946,* the assured Warner reported (*inter alia):*

> "My wife June was riding in the cab with me at the time. The accident occurred about two (2) miles south of Scotia, Calif., on Highway No. 101. I had no cargo at the time. I was returning from Willow Creek, Calif. I had taken my mother and son there to visit my sister at Willow Creek."

On *August 8, 1946,* the plaintiffs (appellants) in the instant action filed a personal injury action against the assureds, Warner and Woodrow (Tr. 5), and on *August 26, 1946,* the insurance company (appellee here) and Warner and Woodrow executed (Def's. Ex. A, Tr. 159-160) a reservation of rights agreement under which the insurance company assumed the defense of the personal injury action.

On *October 18, 1946,* in the U. S. District Court in San Francisco (Tr. 13) the insurance company (defendant and appellee in this action) filed an action for declaratory relief in which it sought an adjudication of non-coverage as against its assureds and also as against the plaintiffs in the personal injury action

and in this action. (The latter were not served in the declaratory relief action.)

On *August 11, 1947,* the declaratory relief action came on for hearing before Judge Goodman in the District Court in San Francisco, on Warner's default (Tr. 15), and at that time Warner testified that he had gone up to Willow Creek (which is near Eureka) and that (Tr. 156) he "had intended, if possible, to haul barrels out of Willow Creek", although he saw no one about this (Tr. 156). The principal purpose mentioned by him to Judge Goodman respecting the trip up to the Eureka area was in the nature of a vacation purpose (Tr. 156-158).

In *September of 1947,* the personal injury action came on for trial in the Superior Court in San Francisco, and Warner there testified (Tr. 188-193) that he had gone to Blue Lakes (a part of the Willow Creek-Eureka area) with a load of pipe on his trailer, that he had left the trailer there, that on the accident trip he was in the tractor, that his destination at the time of the accident was San Francisco, and that he intended to go back to the Eureka area to get the trailer (Tr. 191).

Warner was then asked (we are still speaking of his testimony in the State Court in September of 1947) the purpose of the trip to San Francisco, on which the accident occurred (Tr. 193):

> "Q. (by Mr. Gray, appellants' counsel in the State Court case and this case). Were you returning back to continue with your business?

A. (by Warner). No, I had a definite purpose in coming down, I might state. I had a payment due on my insurance policy Monday. My policy would lapse if I did not get in here Monday. That was the reason for coming down to Frisco here.

Q. So you came down for that business?

A. That's right.

Q. And when did you intend to go back for your trailer?

A. The following day."

In the trial of the instant case there was no material departure from the accounts previously given by Warner.

On direct examination in the instant case Warner testified as follows concerning his purposes in making the trip on which the accident occurred (Tr. 110-111):

"Q. Now what was your purpose in going to San Francisco?

A. There was an installment due on the policy, this policy. It was due on a Monday morning, or it was due, anyway—I forget how many hours I had grace, but that was my reason for coming to San Francisco as I did, without the trailer."

The accident happened on this trip; Warner continued on to San Francisco, reported the accident to the insurance company, paid the premium, and returned to Eureka to get his trailer, and then came back to San Francisco for the second time (Tr. 114-115).

At this juncture in the trial, Judge Yankwich asked Warner (Tr. 115):

> "Q. Well did you pick up your trailer, and the pipes then unloaded from your trailer?
>
> A. Everything had been unloaded. I had a haul at the time with John Dowdell, of San Jose. That is John Dowdell, Draymen; I believe we were hauling concrete pipe out of San Jose for housing projects all over the area, the peninsula area. That was one of the * * *
>
> Q. Well the point is this; you came back empty?
>
> A. Yes."

(This return trip, of course, refers to the trip from the Eureka area to San Francisco which occurred *after* the trip on which the accident happened.)

On cross-examination (in the instant case), counsel for the plaintiffs asked (Tr. 127):

> "Q. * * * Now you testified that you also came down to discuss with someone in San Jose the hauling of a load, is that true?"

There had been, up to the time of counsel's question, no such testimony, but the witness nevertheless answered in the affirmative (Tr. 127) and stated that that was one of his purposes in making the trip on which the accident occurred, although he neither saw nor communicated with Dowdell (Tr. 139).

Although the assured, Warner, might well have given a more complete report of the circumstances surrounding the accident when he gave his original

report to the insurance company (Def. Ex. B), he fully explained this by stating that it had not occurred to him that his purposes in making the trip on which the accident happened had any bearing on the subject of insurance, and that, accordingly, he had not included in his original report certain details of the trip which he brought out at subsequent dates (Tr. 129-132).

As stated in Judge Yankwich's opinion (Tr. 57-58):

> "*In these statements, made shortly after the accident, the aim of the trip was given as a vacation for his mother, wife, and himself.* He claimed that the reason for the omission of the fact that he was carrying the pipe and the household goods was that he thought it unimportant. He admitted, however, that he began to think about the possible significance of the transportation feature of the trip, when, in talking to other truck operators, they reminded him that this transportation might have a bearing upon the liability insurance which he carried. One fact stands out in this narrative: The main purpose of the return trip was made to pay the premium. *This main purpose was, in fact, the sole purpose, because we cannot consider any intention not carried into effect, such as solicitation of business.*"